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No. 03-13

In the Supreme Court of the United States

REPUBLIC OF AUSTRIA, ET AL., PETITIONERS

v.

MARIA V. ALTMANN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, authorizes United States courts to exercise jurisdiction over a claim, arising before the FSIA's enactment, that a foreign state expropriated property in violation of international law.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
A. Foreign sovereign immunity	2
B. The factual allegations in this case	4
Summary of argument	7
Argument:	
The FSIA does not authorize United States courts to exercise jurisdiction over an expropriation claim against a foreign state based on conduct that occurred before enactment of the FSIA	9
A. This Court's retroactivity decisions preclude application of the FSIA's expropriation exception to claims that arose before enactment of the FSIA	9
1. The FSIA is subject to established retroactivity principles	9
2. The application of those retroactivity principles depends on the particular FSIA provision at issue	11
3. The FSIA's expropriation exception created a new substantive liability that is subject to the presumption of non-retroactive application	12
4. There is no basis for overcoming the presumption that the FSIA's expropriation exception is non-retroactive	14
5. Retroactive application of the FSIA's expropriation exception would be inconsistent with international norms	17

Table of Contents—Continued: Page

B. The court of appeals erred by relying on unfounded speculation that, before enactment of the FSIA, the Executive Branch would have abridged a foreign state's sovereign immunity in the instance of Holocaust claims 20
1. The court of appeals erred in attempting to surmise whether the Executive Branch would have recognized a special exception for Holocaust claims before enactment of the FSIA 20
2. The United States did not condition a foreign state's right to absolute immunity on whether the state was an "unfriendly" nation 21
3. The United States did not depart from the governing principles of sovereign immunity in the case of Holocaust-related claims 24
4. Austria did not lose its right to absolute sovereign immunity in United States courts by adopting the restrictive theory of foreign sovereign immunity 28
Conclusion 30
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Abrams v. *Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173 (2d Cir. 2003), petition for cert. pending, No. 03-284 (filed Aug. 19, 2003) 15
Alfred Dunhill of London, Inc. v. *Cuba*, 425 U.S. 682 (1976) 3, 13
Ambatielos Case (Greece v. United Kingdom), 1952 I.C.J. 28 17

Cases—Continued: Page

American Hawaiian Ventures, Inc. v. *M.V.J. Latuharhary*, 257 F. Supp. 622 (D.N.J. 1966) 27
American Ins. Ass'n v. *Garamendi*, 123 S. Ct. 2374 (2003) 18, 22
Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 1, 19, 25
Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 26, 27
Bernstein v. *N.V. Nederlandsche-Amerikaansche*:
173 F.2d 71 (2d Cir. 1949) 26
210 F.2d 375 (2d Cir. 1954) 26, 27
California v. *Deep Sea Research, Inc.*, 523 U.S. 491 (1998) 16
Carl Marks & Co. v. *Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir.), cert. denied, 487 U.S. 1219 (1988) 10, 12
Carrato v. *United States*, [1982] 40 O.R. (2d) 459 (H.C.), judgment endorsed and appeal dismissed, File No. 22/83 (Ont. Ct. App. Oct. 17, 1983) 19
Chemical Natural Res., Inc. v. *Republic of Venezuela*, 215 A.2d 864 (Pa. 1966) 13
Dames & Moore v. *Regan*, 453 U.S. 654 (1981) 14, 22
Deutsch v. *Turner Corp.*, 324 F.3d 692 (9th Cir.), cert. denied, 124 S. Ct. 105 (2003) 28
Fujitsu Ltd. v. *Federal Experss Corp.*, 247 F.3d 423 (2d Cir.), cert. denied, 534 U.S. 891 (2001) 17
Garb v. *Republic of Poland*, 72 Fed. Appx. 850 (2d Cir. 2003), petitions for cert. pending, Nos. 03-500 & 03-517 20
Guaranty Trust Co. v. *United States*, 304 U.S. 126 (1938) 3, 11
Hughes Aircraft Co. v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) 7, 9, 10, 28
INS v. *St. Cyr*, 533 U.S. 289 (2001) 11, 15, 16

Cases—Continued: Page

Jackson v. *People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), cert. denied, 480 U.S. 917 (1987) 10, 12, 15
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 22
Joo v. *Japan*, 332 F.3d 679 (D.C. Cir. 2003) 10, 11, 12, 15, 18, 19, 22
Landgraf v. *USI Film Prod.*, 511 U.S. 244 (1994) 9
Lindh v. *Murphy*, 521 U.S. 320 (1997) 15
Mexico v. *Hoffman*, 324 U.S. 30 (1945) 3, 21, 24
Minnesota v. *United States*, 305 U.S. 382 (1939) 29
Princz v. *Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), cert. denied, 513 U.S. 1121 (1995) 25
Republic of Argentina v. *Weltover, Inc.*, 504 U.S. 607 (1992) 13
Republic of Peru, Ex parte, 318 U.S. 578 (1943) 3, 10, 11, 21, 23
Ricaud v. *Amerian Metal Co.*, 246 U.S. 304 (1918) 22
Rich v. *Naviera Vacuba, S.A.*, 197 F. Supp. 710 (E.D. Va.), aff'd 295 F.2d 24 (4th Cir. 1961) 13
Sampson v. *Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001) 25, 26
Saudi Arabia v. *Nelson*, 507 U.S. 349 (1993) 1, 13 19, 24, 25
Smith v. *Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 229 (2d Cir. 1996) 26
Stephen v. *Zivnostenska Banka*, 15 A.D.2d 111 (N.Y. App. Div. 1961), aff'd, 186 N.E.2d 676 (1962) 13-14
The Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822) 16
The Schooner Exchange v. *M'Fadden*, 11 U.S. (7 Cranch) 116 (1812) 2, 21
Tritt v. *United States*, [1989] Ont. Sup. C. J. Lexis 455 19

Cases—Continued: Page

Underhill v. *Hernandez*, 168 U.S. 250 (1897) 22
Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 2, 4, 10, 12, 20, 21
Victory Transport, Inc. v. *Comisaria General de Abastecimientos y Tranportes*, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965) 12-13, 24, 28
W.S. Kirkpatrick & Co. v. *Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990) 26
Ware v. *Hylton*, 3 U.S. (3 Dall.) 198 (1796) 23
Weltover, Inc. v. *Republic of Argentina*, 941 F.2d 145 (2d Cir. 1991), aff'd, 504 U.S. 607 (1992) 6
Wulfsohn v. *Russian Socialist Federated Soviet Republic*, 138 N.E. 24 (N.Y. 1923) 16, 22
Zwack v. *Kraus Bros. & Co.*, 237 F.2d 255 (2d Cir. 1956) 27

Treaties, statutes and rules:

Agreement Relating to the Agreement of Oct. 24, 2000, Concerning the Austrian Fund "Reconciliation, Peace, and Cooperation", Jan. 23, 2001, U.S.-Aus., 2001 WL 935261, Annex A 18
Austria: Settlement of Certain Claims Under Article 26 of the Austrian State Treaty, May 22, 1959, U.S.-Aus., 10 U.S.T. 1158 18
Bulgaria: Claims, Jul. 2, 1963, U.S.-Bulg., 14 U.S.T. 969 14
Convention on the Settlement of Matters Arising out of the War and the Occupation, as amended, Oct. 23, 1954, 6 U.S.T. 4411 18
Council of Europe: European Convention on State Immunity and Additional Protocol, art. 35(3), 11 I.L.M. 470, 482 (1972) 19
Declaration on Austria at Moscow, S. Exec. Rep. No. 8, 84th Cong., 1st Sess. (1955) 23

Treaties and statutes—Continued: Page

Poland: Settlement of Claims of United States Nationals, Jul. 16, 1960, U.S.-Pol., 11 U.S.T. 1953 14
Romania: Settlement of Claims of United States Nationals and Other Financial Matters, Mar. 30, 1960, U.S.-Rom. 11 U.S.T. 317 14
State Treaty for the Re-establishment of an Independent and Democratic Austria, May 15, 1955, art. 26, 6 U.S.T. 2369, 2435 18
Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169 18
Vienna Convention on the Law of Treaties, S. Exec. Doc. L, 92d Cong., 1st Sess. (1971) 17
Yugoslavia: Claims of United States Nationals Nov. 5, 1964, U.S.-Yugo., 16 U.S.T. 1 14
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(c), 110 Stat. 1243 16
Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. 1330, 1602 *et seq.*) 1, 3-4
28 U.S.C. 1602 ..... 15, 20
28 U.S.C. 1603(b) 6
28 U.S.C. 1604 ..... 4, 11, 19
28 U.S.C. 1605(a)(1) 12, 25
28 U.S.C. 1605(a)(2) 12
28 U.S.C. 1605(a)(3) 5, 1a
28 U.S.C. 1605-1607 4
International Claims Settlement Act Amendments of 1955, ch. 645. 69 Stat. 562 (22 U.S.C. 1641 *et seq.*) 22
International Claims Settlement Act Amendments of 1958, Pub. L. No. 85-604, 72 Stat. 527 (22 U.S.C. 1642 *et seq.*) 14
International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* 22
Trading with the Enemy Act, ch. 106, 40 Stat. 411 (50 U.S.C. App. 1 *et seq.*) 22

Statutes—Continued: Page

War Claims Act of 1948, ch. 826, 62 Stat. 1240 (50 U.S.C. App. 2001 *et seq.*) 18, 22
22 U.S.C. 2370(e)(2) 27
Foreign States Immunities Act, 1985, § 7 (Austl.) (*reprinted in* 25 I.L.M. 715 (1986)) 19
State Immunity Act, 1978, § 23 (Eng.) (*reprinted in* 17 I.L.M. 1123 (1978)) 19
State Immunity Act, 1979, § 1 (Sing.) (*available at* <http://agcvldb4.agc.gov.sg/>) 19
State Immunity Act, 1982 (Can.) (*reprinted in* 21 I.L.M. 798 (1982)) 19

Miscellaneous:

Comment, *American Oil Investors' Access to Domestic Courts in Foreign Nationalization Disputes*, 123 U. Pa. L. Rev. 610 (Jan. 1975) 13, 27
Note, *Avoiding Expropriation Loss*, 79 Harv. L. Rev. 1666 (June 1966) 13, 14
Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1666 (June 1962) 13
Dep't of St. Bull., July 9, 1956 18
H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) 15, 20, 29
1 Robert Jennings & Arthur Watts, *Oppenheim's International Law* (9th ed. 1992) 17
Letter from Legal Adviser Monroe Leigh to the Solicitor General (Nov. 26, 1975) (*reprinted in* 425 U.S. 706 (1976)) 27
Letter from Acting Legal Adviser Jack B. Tate to Acting Attorney General Phillip B. Perlman (May 19, 1962) (*reprinted in* 425 U.S. 711 (1976)) 3
Andreas F. Lowenfeld, *The Sabbatino Amendment—International Law Meets Civil Procedure*, 59 Am. J. Int'l L. 899 (1965) 13, 27

Miscellaneous—Continued: Page

Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, XXX British Year Book of International Law 5 (1953) 17

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the proper construction of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, which presents the sole basis for civil litigants to obtain jurisdiction over a foreign state in United States courts. See *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). The United States has a particularly strong interest in questions respecting the FSIA's retroactive application, which carry the potential for serious adverse effects on our Nation's foreign relations. The United States also has a unique perspective on the government's sovereign immunity practice before enactment of the FSIA, when the Executive Branch bore primary responsibility for making immunity determinations.

STATEMENT

Petitioners Republic of Austria and the Austrian Gallery (collectively, Austria) challenge a court of appeals' decision arising from respondent's suit to recover artwork that was, respondent alleges, unlawfully confiscated from her uncle during the Holocaust. The court of appeals affirmed the determination of the United States District Court for the Central District of California, on Austria's motion to dismiss, that the FSIA confers jurisdiction over the suit and that respondent satisfied other procedural preconditions for bringing that action.[1]

A. Foreign Sovereign Immunity

The United States' approach to the question of foreign sovereign immunity can be separated into three distinct periods of the Nation's history. From the Nation's founding until 1952, the United States adhered to the "absolute" theory of foreign sovereign immunity. See *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). The Court endorsed that principle in *The Schooner Exchange* v. *M'Fadden*, 11 U.S. (7 Cranch) 116 (1812), reasoning that, as a necessary consequence of the dignity to be accorded foreign sovereigns and the need for the courts to avoid upsetting international relations, "the person of the sovereign [is immune] from arrest or detention within a foreign territory" if he enters "with the knowledge and license of its sovereign." *Id.* at 137. Under the "absolute theory of sovereign immunity," as understood and applied by the Executive Branch, "foreign sovereigns and their public property are * * * not * * * amenable to suit in our courts without

[1] Because this case is before the Court on the court of appeals' affirmance of the district court's denial of Austria's motion to dismiss, the allegations of the complaint are accepted as true for purposes of resolving petitioners' jurisdictional objections. See Pet. App. 9a.

their consent." *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134 (1938).[2]

In 1952, the United States' practice was altered when, in the "Tate Letter," the Executive announced its adoption of the "restrictive" theory of foreign sovereign immunity. See Letter from Acting Legal Adviser Jack B. Tate to Acting Attorney General Philip B. Perlman (May 19, 1962) (*reprinted in Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 711-715 (1976)). The Tate Letter stated that thenceforth the Department of State would recommend to United States courts, as a matter of policy, that foreign states be granted immunity only for their sovereign or public acts (*jure imperii*), and not for their commercial acts (*jure gestionis*). *Ibid.* See *Verlinden*, 461 U.S. at 486-487. The United States adopted the restrictive theory in light of the growing acceptance of that theory among foreign nations and the need for a judicial forum to resolve disputes stemming from the "widespread and increasing practice on the part of governments of engaging in commercial activities." *Alfred Dunhill*, 425 U.S. at 714 (Tate Letter).

In 1976, Congress enacted the FSIA, which reflects the United States' current approach to foreign sovereign immunity. See Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C.

[2] Although, under the traditional approach, foreign sovereigns were absolutely immune from suit in United States courts, the question occasionally arose whether a particular *res* should be entitled to the sovereign's immunity. See, *e.g.*, *Mexico* v. *Hoffman*, 324 U.S. 30, 37 (1945). In recognition of the potential for international conflict inherent in such determinations, the courts developed the practice of deferring to the Executive Branch's judgment in such matters. See, *e.g.*, *Ex parte Republic of Peru*, 318 U.S. 578, 588-589 (1943). The courts determined whether the particular property at issue was entitled to the benefit of the foreign sovereign's immunity "in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations." *Hoffman*, 324 U.S. at 34-35.

1330, 1602, *et seq.*). The FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden*, 461 U.S. at 488. "For the most part, the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Ibid.* The FSIA sets forth a general rule that foreign states are immune from suit in United States courts, 28 U.S.C. 1604, and that courts may exercise jurisdiction over foreign states *only* if the suit comes within one of the specific exceptions to that rule established by Congress, see 28 U.S.C. 1605-1607. Thus, if the suit does not come within one of the exceptions, the fundamental rule of Section 1604 retains the foreign sovereign's immunity. Congress specifically intended to relieve the State Department of the diplomatic pressures associated with case-by-case suggestions of immunity and to establish legal principles to guide the courts. See *Verlinden*, 461 U.S. at 488.

B. The Factual Allegations In This Case

Respondent was a Jewish citizen of Austria who fled Nazi persecution and came to the United States, where she became an American citizen. She brought this action to recover six paintings by the famous Austrian artist Gustav Klimt that the Republic of Austria currently possesses and houses within the Austrian Gallery. The paintings at issue include the now-famous Klimt portraits of respondent's aunt, Adele Bloch-Bauer. Respondent alleges that, during the Holocaust, Nazi officials confiscated the paintings from her uncle, Ferdinand Bloch-Bauer, in violation of international law. Pet. App. 38a-41a.

According to respondent's complaint, Ferdinand Bloch-Bauer's heirs attempted to recover the expropriated property under post-war restitution laws, but Austria maintained that Adele Bloch-Bauer, who had died in 1925, had bequeathed the Klimt paintings to Austria. Pet. App. 41a-42a. Respondent recounts that, in the immediate post-war period, Austrian Gallery officials insisted that Ferdinand's heirs relinquish their claims to those Klimt paintings in exchange for the right to export other recovered property. *Id.* at 41a-44a. Respondent further asserts that, in 1998, she obtained documents from the Austrian Gallery's archives revealing that, even in 1948, the Gallery had known that Adele's testamentary wish that the paintings be donated to the Gallery was not legally binding. *Id.* at 42a-43a & n.8, 45a n.11.

Respondent and her fellow heirs filed an administrative claim in Austria, seeking return of the Klimt paintings. Pet. App. 46a-47a. The administrative committee returned a number of Klimt drawings and a portion of Ferdinand's valuable porcelain collection to Ferdinand's heirs. But the committee voted, allegedly under political pressure, to deny the claims as to the Klimt paintings. *Id.* at 47a. Although respondent could have sought review of the administrative decision through the Austrian courts upon paying a filing fee, *id.* at 8a, she instead filed this suit in federal district court, *ibid.*

Respondent claims that Austria expropriated the Klimt paintings in violation of international law and that the district court has jurisdiction pursuant to the FSIA's expropriation exception, 28 U.S.C. 1605(a)(3) (reproduced in Appendix, *infra*, 1a). Austria moved to dismiss, arguing, *inter alia*, that the FSIA could not be applied retroactively to conduct that occurred in the 1930s and 1940s. The district court denied the motion, holding that the FSIA expropriation exception confers jurisdiction over disputes arising from events predating its enactment. Pet. App. 59a.[3]

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[3] Throughout the litigation, the parties have accepted that the Republic of Austria is a foreign state, that the Austrian Gallery is an "agency or instrumentality" of that foreign state, and that the Gallery is

Austria appealed pursuant to the collateral order doctrine. See *Weltover, Inc.* v. *Republic of Argentina*, 941 F.2d 145, 147 (2d Cir. 1991), aff'd, 504 U.S. 607 (1992). The court of appeals affirmed, ruling that "the exercise of jurisdiction in this case does not work an impermissible retroactive application of the FSIA." Pet. App. 2a. That court did "not reach the broad conclusion of the district court that the FSIA may be generally applied to events predating the 1952 Tate Letter." *Id.* at 11a. It acknowledged rulings of other courts "not to apply the FSIA to events predating its enactment," *id.* at 13a-14a, and it assumed, "without deciding," that those cases were correct, *id.* at 14a. The court nevertheless concluded that application of the FSIA's expropriation exception would not be impermissibly retroactive because, in the court's estimation, the Executive Branch would not have recognized Austria's claim of immunity from respondent's World-War-II-era claim. *Id.* at 14a-21a. The court cited contemporaneous State Department pronouncements that the Allies reserved the right to declare forced property transfers in Axis territories invalid and that the courts should not refrain from passing on the validity of acts of Nazi officials. See *id.* at 17a-18a. The court reasoned, from those statements, that the Executive Branch would have allowed American courts to exercise personal jurisdiction over these

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therefore subject to the FSIA's protections. See 28 U.S.C. 1603(b). Although respondent's complaint alleges that the Republic and the Gallery had separate legal identities at the time of suit, see Compl. para. 5, respondent concedes that, "both before and after the recent 'privatization,'" the Gallery "was and is an organ of the Austrian Ministry of Education of Culture" that satisfies the FSIA definition of "agency or instrumentality." Plaintiff Maria Altmann's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss Under Fed. R. Civ. P. 12(b) at 17 n.9. The district court stated, without explanation, that "the Gallery * * * [was] no longer an organ of the Republic" when suit was filed, Pet. App. 64a, but neither party apparently shares that view.

"unfriendly" nations to compel the return of property seized in violation of international law. See *id.* at 18a-19a.[4]

SUMMARY OF ARGUMENT

Congress enacted the FSIA to provide statutory rules governing the scope of foreign sovereign immunity and to grant the courts responsibility for making immunity determinations pursuant to those legislatively prescribed principles. In part, the FSIA codified the immunity practices that the State Department had announced in 1952. But the FSIA also established new substantive rules of sovereign immunity, including a new exception from the general rule of immunity allowing United States courts to exercise jurisdiction, in certain circumstances, over suits arising from a foreign nation's taking of property in violation of international law.

Respondent is mistaken in urging that the FSIA, and the expropriation provision in particular, should be applied retroactively to allow individuals to sue foreign states in United States courts based on conduct occurring sixty years ago. This Court's decisions governing non-retroactivity establish that, in the absence of a clear statement of contrary

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[4] The court also relied on three additional considerations. First, the court reasoned that, because Austria had itself accepted the restrictive theory of immunity prior to World War II, opening American courts to hear claims against Austria merely affected "*where* a suit may be brought, not *whether* it may be brought at all." Pet. App. 20a (quoting *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 951 (1997)). Second, the court stated that other judicial decisions holding that the FSIA does not apply retroactively to pre-1952 conduct had involved "economic transactions" in which the foreign state had not recognized the restrictive theory of immunity at the time of the conduct at issue. *Id.* at 20a. Finally, the court distinguished those decisions on the ground that a foreign government's commercial activity is entitled to greater protection from retroactive legislation than are its sovereign acts taken in violation of international law. *Id.* at 21a.

intent not present here, federal legislation does not apply new rules of substantive law to events long past. That principle has particular force in this case, where the type of conduct at issue is extensively addressed through treaties, agreements, and separate legislation that were all adopted against the background assumption that such claims could not be litigated in United States courts.

The court of appeals' retroactivity analysis rests on a fundamental misunderstanding of the United States' law and practice regarding foreign sovereign immunity before the 1952 Tate Letter. Contrary to that court's impression, the United States adhered to the "absolute" theory of immunity at the time of Austria's challenged conduct and did not recognize an exception to immunity for expropriations or other violations of international law. The United States did not follow any established exception allowing this Nation's courts to exercise jurisdiction over "unfriendly" nations. Indeed, even today, the FSIA does not provide any such categorical exception. The courts should not engage in an attempt to surmise whether, more than half a century ago, the Executive Branch would have denied immunity to a particular foreign state on some extraordinary or ad hoc basis, such as punishment for particularly egregious conduct. The courts of that era would never have presumed the authority to make such inherently political decisions, and the FSIA does not provide the courts of this era authority to speculate retroactively on what the Executive and the courts might have done.

ARGUMENT

THE FSIA DOES NOT AUTHORIZE UNITED STATES COURTS TO EXERCISE JURISDICTION OVER AN EXPROPRIATION CLAIM AGAINST A FOREIGN STATE BASED ON CONDUCT THAT OCCURRED BEFORE ENACTMENT OF THE FSIA

The court of appeals erred in two fundamental respects. First, it failed to give proper account to this Court's retroactivity decisions, which counsel that the FSIA's expropriation exception should not be applied retroactively to conduct that predated enactment of the FSIA and, indeed, predated the United States' adoption of the restrictive theory of foreign sovereign immunity in 1952. Second, the court erred by relying on its own speculation that, notwithstanding the United States' pre-1952 adherence to the doctrine of absolute sovereign immunity, the Executive Branch would have departed from the United States' practice during that period in the case of Holocaust claims.

A. This Court's Retroactivity Decisions Preclude Application Of The FSIA's Expropriation Exception To Claims That Arose Before Enactment Of The FSIA

1. The FSIA is subject to established retroactivity principles. This Court's decisions establish that any statute that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," is presumed to apply prospectively only. *Landgraf* v. *USI Film Prod.*, 511 U.S. 244, 280 (1994). That presumption applies to statutes that, although termed "jurisdictional," change the law in a way that "eliminates a defense to * * * suit." *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 948 (1997). Such a change "does not merely allocate jurisdiction among forums." *Id.* at 951. "Rather, it

creates jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well." *Ibid.* "Such a statute, even though phrased in 'jurisdictional' terms, is as much subject to [the] presumption against retroactivity as any other." *Ibid.*

The defense of foreign sovereign immunity is a matter of "*substantive* federal law," *Verlinden* 461 U.S. at 493 (emphasis added). See *Ex parte Republic of Peru*, 318 U.S. at 588 (describing foreign sovereign immunity as "an overriding principle of substantive law"). As in *Hughes*, Congress's elimination of such a defense is subject to the presumption against retroactive legislation. Indeed, every court of appeals that has squarely addressed the issue has concluded that the abolition of a foreign state's previously recognized immunity from suit constitutes a substantive change that is subject to the presumption against retroactivity. See *Joo* v. *Japan*, 332 F.3d 679, 684 (D.C. Cir. 2003) ("The commercial activity exception to the FSIA, by qualifying what previously had been the absolute immunity of foreign sovereigns, * * * 'creates jurisdiction where none previously existed' and therefore affects the substantive rights of the concerned parties." (quoting *Hughes*, 520 U.S. at 951)); *Carl Marks & Co.* v. *Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir.) ("retroactive application of the FSIA [to claims based on bearer bonds issued in 1916] would affect adversely the USSR's settled expectation * * * of immunity from suit in American courts"), cert. denied, 487 U.S. 1219 (1988); *Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1497-1498 (11th Cir. 1986) ("to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns" and would be "manifestly unfair"), cert. denied, 480 U.S. 917 (1987).

2. The application of those retroactivity principles depends on the particular FSIA provision at issue. Federal statutes are frequently an amalgam of procedural and substantive provisions. As a result, retroactivity principles must be applied in light of the content of the particular provisions at issue. On the one hand, some provisions of a statute may be properly characterized as procedural or as not affecting substantive rights, and they are properly applied to all pending cases. On the other hand, provisions that create new substantive obligations and liabilities are properly presumed to apply only prospectively unless Congress clearly expresses a contrary intent. See, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289 (2001).[5]

In the case of the FSIA, some provisions—such as the service-of-process and removal provisions—are readily identifiable as procedural and presumptively apply to all litigation filed after the FSIA's effective date. See *St. Cyr*, 533 U.S. at 318. Other provisions, such as the FSIA's codification of the general rule of foreign sovereign immunity, 28 U.S.C. 1604, and the common-law exceptions regarding waiver and counterclaims that existed before the FSIA and, indeed, before the Tate Letter, see, *e.g.*, *Ex parte Republic of Peru*, 318 U.S. at 589; *Guaranty Trust Co.*, 304 U.S. at 134-135, simply restate pre-existing principles and apply regardless of when the challenged conduct occurred. See, *e.g.*, *Joo*, 332 F.3d at 686-687 (considering but rejecting proposition that Japan's violation of fundamental international

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[5] In *St. Cyr*, the Court analyzed the question of retroactivity separately for each provision of the statute at issue, concluding that some provisions would present no question of retroactivity while others, which affected substantive rights, were subject to a presumption against retroactive application. See 533 U.S. at 318-320. In undertaking this provision-by-provision analysis, the Court concluded that statements of congressional intent as to the retroactive application of some provisions did not imply a similar intent with regard to other provisions. See *ibid.*

law norms in the 1930s and 1940s would constitute an implied waiver of immunity under 28 U.S.C. 1605(a)(1)); *Carl Marks*, 841 F.2d at 27 (noting that a pre-1952 claim against the Soviet Union could have proceeded under the FSIA if the Soviet Union had "consented to suit").

Other provisions of the FSIA, however, require a different result. Most significantly, new exceptions to the general rule of foreign sovereign immunity that abrogate past protections from suit are properly viewed under *Hughes* as abridging substantive rights. In that situation, however, care must be taken in examining the character of the right in question. For example, the FSIA's "commercial activity" exception (28 U.S.C. 1605(a)(2)), for the most part, codified past practice, but only as it had existed since the issuance of the Tate Letter in 1952, which announced that a foreign state's commercial activities could provide a predicate for a cause of action in United States courts. See *Verlinden*, 461 U.S. at 488. Consequently, the FSIA's commercial activity exception generally can be applied, without raising retroactivity concerns, to conduct occurring after 1952. See *Joo*, 332 F.3d at 684; *Carl Marks*, 841 F.2d at 27; *Jackson*, 794 F.2d at 1497-1498.

3. The FSIA's expropriation exception created a new substantive liability that is subject to the presumption of non-retroactive application. Under the absolute theory of sovereign immunity, a foreign state, by definition, was not subject to liability for expropriations within its own borders. And even under the restrictive theory, a foreign state's act of expropriation was a public or "sovereign" act, as to which the foreign state retained its sovereign immunity. The expropriation exception very clearly did not exist in 1952 and, indeed, was a new development in the doctrine of sovereign immunity when the FSIA was enacted 24 years later.

The Second Circuit directly addressed that question in *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (1964), cert. denied, 381 U.S. 934 (1965). The court explained that, even under the restrictive theory of sovereign immunity, foreign states continued to enjoy immunity with respect to suits challenging "strictly political or public acts about which sovereigns have traditionally been quite sensitive," which included, in particular, suits respecting the "nationalization" of property. *Id.* at 360.[6] The Second Circuit's analysis in *Victory Transport* was recognized at the time as an "authoritative statement of the sovereign immunity doctrine in the United States." Andreas F. Lowenfeld, *The Sabbatino Amendment–International Law Meets Civil Procedure*, 59 Am. J. Int'l L. 899, 907 (1965). Indeed, this Court has frequently cited the *Victory Transport* decision as illustrating the pre-FSIA application of the restrictive theory of sovereign immunity. See *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 361 (1993); *Republic of Argentina*, 504 U.S. at 613; *Alfred Dunhill*, 425 U.S. at 703 (plurality opinion).[7]

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[6] See Note, *Avoiding Expropriation Loss*, 79 Harv. L. Rev. 1666, 1666 (June 1966) ("Since expropriation is not a 'private' state act for purposes of the restrictive doctrine of sovereign immunity announced in the Tate Letter, a United States investor is not able to litigate his claim by obtaining quasi-in-rem jurisdiction over an expropriating state's assets in the United States." (footnotes omitted)); Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607, 1618 (June 1962) ("Since expropriation is a governmental act, sovereign immunity will frustrate attempts to sue the state.").

[7] See also Comment, *American Oil Investors' Access to Domestic Courts in Foreign Nationalization Disputes*, 123 U. Pa. L. Rev. 610, 625 (1975) (noting that "no judicial opinion has challenged" *Victory Transport*'s conclusion that expropriations were *jure imperii* as to which a foreign state retained its immunity). See, *e.g.*, *Chemical Natural Res., Inc.* v. *Republic of Venezuela*, 215 A.2d 864 (Pa. 1966) (dismissing expropriation claim in which State Department filed suggestion of immunity; *Rich* v. *Naviera Vacuba S.A.*, 197 F. Supp. 710, 724-725 (E.D. Va.) (accord), aff'd 295 F.2d 24 (4th Cir. 1961); but cf. *Stephen* v. *Zivnostenska*

The *Victory Transport* decision rested on the pre-FSIA understanding that private complaints about foreign expropriations were simply not matters for resolution in United States courts. Rather, they were to be resolved through (1) "negotiation," (2) "remedies in the local courts" of the expropriating government, or (3) State Department espousal, in which case the State Department would seek compensation "through either diplomatic negotiation or adjudication before an arbitral body or international court." Note, *Avoiding Expropriation Loss*, 79 Harv. L. Rev. 1666, 1666 (June 1966). There are numerous pre-FSIA examples of such executive agreements through which the State Department espoused and settled private expropriation claims. See generally *Dames & Moore* v. *Regan*, 453 U.S. 654, 679-683 (1981).[8]

4. There is no basis for overcoming the presumption that the FSIA's expropriation exception is non-retroactive. Respondent would have the courts infer that Congress intended the FSIA's expropriation exception to authorize litigation of all expropriation claims, including claims that arose when the United States adhered to the absolute theory of immunity. There is no basis for doing so.

Banka, 15 A.D. 2d 111, 119-120 (N.Y. App. Div. 1961), aff'd, 186 N.E.2d 676 (1962).

[8] See, *e.g.*, Yugoslavia: Claims of U.S. Nationals, Nov. 5, 1964, U.S.-Yugo., 16 U.S.T. 1; Bulgaria: Claims, Jul. 2, 1963, U.S.-Bulg., 14 U.S.T. 969; Poland: Settlement of Claims of U.S. Nationals, Jul. 16, 1960, U.S.-Pol., 11 U.S.T. 1953; Romania: Settlement of Claims of U.S. Nationals and Other Financial Matters, Mar. 30, 1960, U.S.-Rom., 11 U.S.T. 317. As a further example, when Congress chose to provide unilateral relief to United States citizens whose property was expropriated by Czechoslovakia, it did so through an administrative scheme funded with proceeds from the sale of blocked foreign state assets; it did not encourage wholesale litigation against the foreign state. See International Claims Settlement Act Amendments of 1958, Pub. L. No. 85-604, 72 Stat. 527 (22 U.S.C. 1642 *et seq.*).

This Court has made clear that it will not infer that Congress intended retroactive application of a substantive provision in the absence of a "clear indication" of congressional intent. *St. Cyr*, 533 U.S. at 316. Rather, a law will be given a "truly 'retroactive' effect" only where the "statutory language * * * [is] so clear that it could sustain only one interpretation." *Lindh* v. *Murphy*, 521 U.S. 320, 328 n.4 (1997). The FSIA does not contain the "clear indication" that would be required to upset a foreign state's reasonable expectations of continued immunity from suit based on alleged expropriations occurring before the FSIA was enacted. The FSIA is simply bare of any unambiguous indication that Congress intended the expropriation exception, or like substantive provisions, to reach conduct that occurred during World War II. See *Joo*, 332 F.3d at 685-686; see also *Abrams* v. *Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173, 184 (2d Cir. 2003), petition for cert. pending, No. 03-284 (filed Aug. 19, 2003).[9]

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[9] Some courts have attempted to determine Congress's intention by reference to a statement in the FSIA's "Findings and declaration of purpose" that "[c]laims of foreign states to immunity *should henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth [in the FSIA]." 28 U.S.C. 1602 (emphasis added). That statement, however, provides no clear guidance. The "most probable meaning of the sentence is that the State Department would no longer consider petitions for sovereign immunity" and that such determinations would thereafter be decided by the courts. *Joo*, 332 F.3d at 686; see H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, 14 (1976). In doing so, the courts could be expected to apply usual rules of statutory construction, including the presumption against retroactive application of new substantive rules. In any event, Section 1602 manifests no clear intent to *deny* immunity that would have been recognized for past sovereign conduct. See *Jackson*, 794 F.2d at 1497 (this language "appeared to be prospective" only and counseled against retroactive application); see also *Abrams*, 332 F.3d at 184 (noting that "[c]ourts have in fact reached diametrically opposite conclusions regarding Congressional purpose").

By contrast, Congress *has* provided "clear indication," in subsequent FSIA amendments, when it has sought to give substantive FSIA provisions retroactive effect. See, *e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(c), 110 Stat. 1243 (providing that the immunity exception for designated state sponsors of terrorism "shall apply to any cause of action arising before, on, or after the date of the enactment of this Act"). Those specifications not only provide clear guidance on the proper application of the provisions at issue, but also indicate that Congress is attentive to the need to designate clearly those substantive provisions that shall have retroactive effect. See *St. Cyr*, 533 U.S. at 318-319 ("[a]nother reason for declining" to adopt a retroactive reading of § 304(b) "is provided by Congress' willingness, in other sections of IIRIRA, to indicate unambiguously its intention to apply specific provisions retroactively").[10]

[10] This Court's *in rem* decisions, which recognize that a federal court's jurisdiction is not barred by a mere suggestion of a foreign government's ownership of a *res*, are inapposite to the inquiry here. See *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491, 507 (1998); note 2, *supra*. As this Court has explained, there is a critical distinction between adjudicating legal title over disputed property that is present within the court's territorial jurisdiction, even where one of the claimants is a foreign government, and resolving a separate claim of wrongdoing against a foreign sovereign through *in personam* or *quasi in rem* jurisdiction. See *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 351 (1822) (recognizing "the exemption of a public ship from proceedings *in rem*, in our Courts for illegal captures on the high seas," but holding that no similar rule "exempts her *prizes* in our ports from the ample exercise of our jurisdiction"). See also *Wulfsohn* v. *Russian Socialist Federated Soviet Republic*, 138 N.E. 24, 25 (N.Y. 1923) (distinguishing between proceedings respecting "title to property situated within the jurisdiction of our courts" and suits where "[t]he government itself is sued for an exercise of sovereignty within its own territories").

5. Retroactive application of the FSIA's expropriation exception would be inconsistent with international norms. This Court may usefully consult international norms in assessing whether the expropriation provision is retroactive. The general understandings of the international community support the conclusion that the expropriation exception should not be given retroactive effect. For example, in cases before the International Court of Justice, a party's obligations and liabilities arising from past conduct "must be appraised * * * in the light of the rules of international law as they existed at the time, and not as they exist today." Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, XXX British Year Book of International Law 5 (1953). See, *e.g.*, *Ambatielos Case (Greece v. United Kingdom)*, 1952 I.C.J. 28, 40 (Preliminary Objection of Jul. 1) (rejecting an argument of Greece that "would mean giving retroactive effect to Article 29 of the Treaty of 1926").[11]

The presumption against projecting new legal developments onto past acts in the international arena is directly

[11] Similarly, international commentators have recognized "the general principle that a juridical fact must be appreciated in light of the law contemporary with it." 1 Robert Jennings & Arthur Watts, *Oppenheim's International Law* 1281-1282 (9th ed. 1992). That principle also finds expression in Article 28 of the Vienna Convention on the Law of Treaties (entitled "Non-retroactivity of treaties"), which provides that, "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." Although the United States has not ratified the Vienna Convention, the United States generally recognizes the Convention as an authoritative guide to principles of treaty interpretation. See, *e.g.*, *Fujitsu Ltd.* v. *Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir.), cert. denied, 534 U.S. 891 (2001); see also Vienna Convention on the Law of Treaties, S. Exec. Doc. L, 92d Cong., 1st Sess. 1, 19 (1971).

relevant in the case of World-War-II-era claims. Long before the FSIA established the expropriation exception for the first time, the United States had entered into numerous treaties and executive agreements that addressed claims relating to the conduct of Germany and its Axis allies, as well as Austria, during World War II.[12] The United States and other foreign nations entered into those agreements against the background assumption that foreign states could not be sued in United States courts. The retroactive application of the FSIA to pre-1952 conduct therefore would introduce significant new issues that the negotiators of those instruments could not have foreseen.[13]

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[12] See, *e.g.*, State Treaty for the Re-establishment of an Independent and Democratic Austria, May 15, 1955, art. 26, 6 U.S.T. 2369, 2435 (providing for return by Austria of all property confiscated on account of the racial origin or religion of the owner); Dep't St. Bull., July 9, 1956, at 66 (announcing Austrian law procedures for compensation of persons who had fled Austria); Austria: Settlement of Certain Claims Under Article 26 of the Austrian State Treaty, May 22, 1959, U.S.-Aus., 10 U.S.T. 1158 (establishing administrative settlement fund for certain property claims); Convention on the Settlement of Matters Arising out of the War and the Occupation, as amended, Oct. 23, 1954, 6 U.S.T. 4411 (Germany); Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169; War Claims Act of 1948, ch. 826, 62 Stat. 1240 (50 U.S.C. App. 2001 *et seq.*) (administrative system for making payments from vested enemy assets to prisoners of war). In 2001, the United States and Austria also concluded an agreement under which the Government of Austria committed to the establishment of a fund to make payments to certain people with Holocaust-related claims. See *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374, 2383 & n.3 (2003). That agreement excludes claims, such as the one in this case, for artwork. See Agreement Relating to the Agreement of Oct. 24, 2000, Concerning the Austrian Fund "Reconciliation, Peace, and Cooperation", Jan. 23, 2001, U.S.-Aus., 2001 WL 935261, Annex A (Reconciliation Fund). Austria has, however, adopted a domestic administrative mechanism to review art restitution claims. See Pet. App. 7a, 46a.

[13] For instance, in *Joo*, the plaintiffs sued Japan respecting that nation's conduct during World War II. See 332 F.3d at 680. The plaintiffs urged that their claims fell within the FSIA's exceptions and that the 1951 Japan Peace Treaty did not speak with sufficient clarity to cut off their right to litigate war-related claims in United States courts. The drafters, however, had no reason to provide such clear language in the Treaty because they could not reasonably have conceived of war-related claims being litigated in the courts of the United States or other allied powers. See *id.* at 684-685.

In short, both domestic and international law principles lead to the same result. The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country," *Saudi Arabia*, 507 U.S. at 355 (quoting *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989)), and the FSIA exceptions can be applied retroactively to override the rule of immunity set forth in Section 1604 only where the particular exception at issue was recognized by the United States at the time of the challenged conduct. Because the United States did not recognize an expropriation exception before the FSIA's adoption, respondent cannot invoke that exception as the basis for asserting jurisdiction, particularly with respect to an alleged expropriation during the 1930s or 1940s.[14]

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[14] This result is consistent with the approach of other countries that have adopted statutes similar to the FSIA. Typically, those enactments expressly provide that the exceptions to immunity are not retroactive or have been so construed by the courts. See State Immunity Act, 1978, § 23 (Eng.) (*reprinted in* 17 I.L.M. 1123 (1978)); Foreign States Immunities Act, 1985, § 7 (Austl.) (*reprinted in* 25 I.L.M. 715 (1986)); State Immunity Act, 1979, § 1 (Sing.) (*available at* http://agcvldb4.agc.gov.sg/); State Immunity Act, 1982 (Can.) (*reprinted in* 21 I.L.M. 798 (1982)); see *Tritt* v. *United States*, [1989] Ont. Sup. C.J. Lexis 455, at * 6 (stating that the Canadian statute is non-retroactive); accord *Carrato* v. *United States*, [1982] 40 O.R. (2d) 459 (H.C.), judgment endorsed and appeal dismissed, File No. 22/83 (Ont. Ct. App. Oct. 17, 1983) (unreported). While the foreign statutes post-date the FSIA, Congress presumably was aware of the governing principle, which also appeared in the European Convention on State Immunity. See Council of Europe: European Convention on State Immunity and Additional Protocol, art. 35(3), 11 I.L.M. 470, 482 (1972)

B. The Court Of Appeals Erred By Relying On Unfounded Speculation That, Before Enactment Of The FSIA, The Executive Branch Would Have Abridged A Foreign State's Sovereign Immunity In The Instance Of Holocaust Claims

1. The court of appeals erred in attempting to surmise whether the Executive Branch would have recognized a special exception for Holocaust claims before enactment of the FSIA. Because Congress did not clearly express an intent that the FSIA's expropriation exception would have retroactive effect, the judicial inquiry into the availability of that exception for pre-FSIA conduct should be at an end. Instead, the court of appeals mistakenly attempted to divine whether, before enactment of the FSIA, the Executive Branch might have departed from established sovereign immunity principles on a country-specific or case-specific basis. The FSIA, which directs the courts to resolve foreign sovereign immunity claims "in conformity with the principles set forth in the [FSIA]," 28 U.S.C. 1602, provides no room for such speculation, which would usurp, retroactively, the Executive's foreign policy responsibility with respect to foreign sovereign immunity at that time. See *Verlinden*, 461 U.S. at 486. In any event, the court's conjectures are without foundation.[15]

("Nothing in this Convention shall apply to proceedings arising out of, or judgments based on, acts, omissions or facts prior to the date on which the present Convention is opened for signature."); see also H.R. Rep. No. 1487, *supra*, at 23, 25 (referring generally to the European Convention).

[15] The Second Circuit has adopted a similarly mistaken approach in *Garb* v. *Republic of Poland* and *Whiteman* v. *Austria*, 72 Fed. Appx. 850, 854 (2003) ("we remand for determinations of the Department of State's policy prior to FSIA with respect to sovereign immunity for Poland and Austria in the circumstances presented in each of the instant cases"), petitions for cert. pending, Nos. 03-500 & 03-517. The Court should

2. The United States did not condition a foreign state's right to absolute immunity on whether the state was an "unfriendly" nation. The court of appeals mistakenly suggested that, before enactment of the FSIA, only "friendly" nations qualified for sovereign immunity. See Pet. App. 14a-15a (quoting *Verlinden*, 461 U.S. at 486). Although the term "friendly foreign sovereigns" does appear in some decisions from the time when the United States applied the absolute theory of immunity, there was no generally recognized exception to immunity for "unfriendly" sovereigns. That language has its origin in *in rem* cases and refers only to the unremarkable fact that the United States would not refrain from seizing an enemy's warships or other property during time of war.[16] There is no support in this Court's decisions for the proposition that United States courts would have reached out to exercise *in personam* or *quasi in rem* jurisdiction over a foreign state for sovereign acts taken within

therefore hold those petitions and dispose of them in accordance with its disposition of this case.

[16] The Court's references to "friendly" foreign states (*Verlinden*, 461 U.S. at 486) can be traced through past *in rem* cases, including *Hoffman*, 324 U.S. at 34, and *Ex parte Republic of Peru*, 318 U.S. at 588, to *The Schooner Exchange*. In that case, the Court stated the general principle that "the person of the sovereign [is immune] from arrest or detention within a foreign territory" if he enters "with the knowledge and license of its sovereign." 11 U.S. (7 Cranch) at 137. The Court then discussed whether that immunity extended to a foreign sovereign's warship that had entered an American harbor. The Court observed that "the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace," *id.* at 141, and it held, therefore, that immunity also extends to "national ships of war, entering the port of a friendly power open for their reception." *Id.* at 145-146. The implicit indication that the United States would not refrain from seizing a belligerent nation's warships if they entered a United States port during time of war says nothing about whether that nation would be subject to private suit in United States courts during the hostilities or after they ceased.

its own territory simply because the United States was not on "friendly" terms with that government during the period of the challenged conduct.[17]

Contrary to the court of appeals' mistaken impression, the United States has not followed a practice of withholding sovereign immunity from "unfriendly" foreign states. Rather, the United States' longstanding policy and practice is to prevent courts from becoming entangled in the conduct of foreign relations and to resolve war-related claims through diplomatic or political, rather than judicial, means.[18] Creating an exception for "unfriendly" nations would likely cause the very type of "embarrass[ment] * * * [to] the Government in conducting foreign relations" that the doc-

[17] The United States, on occasion, has taken steps to freeze, seize, or divest an enemy nation's assets within this country so as to deprive the enemy of their use. See, *e.g.*, International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.*; Trading with the Enemy Act, ch. 106, 40 Stat. 411 (50 U.S.C. App. 1 *et seq.*). But such actions cannot be equated with authorizing United States courts to adjudicate claims directly against a non-consenting, unfriendly sovereign with respect to acts committed within its own territory, including after normal relations between nations had resumed. See *Wulfsohn*, 138 N.E. at 25.

[18] See note 8, *supra*; see also, *e.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763, 789 n.14 (1950) ("the rights of our citizens [under the Geneva Convention relating to prisoners of war] are vindicated only by Presidential intervention"); *Joo*, 332 F.3d at 684-685 (noting policy that World War II claims against Japan be resolved exclusively through diplomatic means); cf. *Garamendi*, 123 S. Ct. at 2380-2382; *Dames & Moore*, 453 U.S. at 679-680; *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 310 (1918); *Oetjen*, v. *Central Leather Co.*, 246 U.S. 297, 303 (1918); *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). Indeed, when Congress itself has acted to provide redress for war-related claims, as after World War II, it has done so through administrative war claims commissions, not through the courts. See, *e.g.*, War Claims Act of 1948, ch. 826, 62 Stat. 1240 (50 U.S.C. App. 2001 *et seq.*); International Claims Settlement Act Amendments of 1955, ch. 645, 69 Stat. 562 (22 U.S.C. 1641 *et seq.*).

trine of immunity is intended to avoid. See *Ex parte Republic of Peru*, 318 U.S. at 588.[19]

Indeed, even if the United States had followed a pre-FSIA practice of withholding immunity from "unfriendly" nations, the responsibility for drawing lines among foreign governments and determining when to strip them of immunity would have belonged with the political Branches that are charged with responsibility for this Nation's foreign relations. The court of appeals' approach would require courts to establish their own definition of "friendly," to assess historical relationships of the United States under that definition, and to decide how to weigh changes in relations during the period when suit might have been brought. That approach is not only unprecedented, but it is fraught with difficulties.[20]

The FSIA does not permit courts to draw such lines, but instead continues the United States' historic policy and practice. It contains no exception to the general rule of foreign sovereign immunity for "unfriendly" sovereigns. The court of appeals' mistaken understanding would subject foreign nations to suit on precisely those claims that the

[19] As a practical matter, an *in personam* suit could be meaningfully pursued only once the hostilities are over and the warring nations have resumed friendly relations. If the conclusion of battlefield operations signaled the start of new hostilities in each nation's courts, those nations would find it far more difficult, if not impossible, to move past their former antagonisms and build constructive new relations. See *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 198, 230 (1796) (opinion of Chase, J.).

[20] For example, contrary to the court of appeals' view, the United States was not at war with the State of Austria during World War II. Indeed, the United States took the view that Austria was the first country to be occupied by Nazi Germany. See Declaration on Austria at Moscow, *quoted in* S. Exec. Rep. No. 8, 84th Cong., 1st Sess. 3 (1955). Such subtle distinctions in our Nation's foreign relations highlight the problem with courts undertaking the kinds of assessments that the court of appeals' decision would require.

courts have heretofore consistently recognized to lie at the core of a foreign state's sovereign immunity.[21]

3. The United States did not depart from the governing principles of sovereign immunity in the case of Holocaust-related claims. The court of appeals further concluded that, before enactment of the FSIA, the United States would have rejected a foreign nation's assertion of sovereign immunity from Holocaust-related claims based on the extraordinary character of those claims. Pet. App. 15a-21a. The court relied on government statements, documents, and actions expressing the United States' strong condemnation of Nazi atrocities. Those expressions, however, do not suggest, much less establish, a policy of the United States that the vast universe of potential private claims against the foreign states that formerly had Nazi governments should be resolved through litigation in United States courts.

Before enactment of the FSIA, United States courts clearly understood that questions of sovereign immunity would be decided "in conformity to the *principles* accepted by the department of the government charged with the conduct of our foreign relations." *Hoffman*, 324 U.S. at 34-35 (emphasis added). Those courts would not have taken it upon themselves to try to discern, from public pronouncements that do not address the question of foreign sovereign immunity, whether the State Department might announce a new immunity exception, with potentially serious consequences for the United States' foreign relations. This Court has previously rejected the notion that the scope of foreign

[21] See *Saudi Arabia* v. *Nelson*, 507 U.S. at 361-363, 362 n.5 (noting that, under the restrictive theory, foreign sovereigns retained their immunity "with respect to claims involving the exercise of the power of the police or military"); *Victory Transport*, 336 F.2d at 360 (restrictive theory retains immunity for "public acts about which sovereigns have traditionally been quite sensitive," such as "acts concerning the armed forces").

sovereign immunity can be pared back by reference to statements that have little or nothing to do with the issue. See *Amerada Hess Shipping*, 488 U.S. at 442 (holding that even a treaty "stat[ing] that compensation shall be paid for certain wrongs" by a foreign government does not imply an abrogation of immunity from private suit). The Court should likewise reject the notion that such statements are useful in determining the retroactive scope of the FSIA.

For example, the court of appeals believed that the fact that Nazi atrocities had violated international law, see Pet. App. 15a, and that the chief architects of the Holocaust had been tried before the international court at Nuremberg, see *id.* at 19a-20a, was evidence that "the international community, and particularly the United States . . . would not have supported a broad enough immunity to shroud the[se] atrocities" from suit, *ibid.* (quoting *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166, 1179 (D.C. Cir. 1994) (Wald, J., dissenting), cert. denied, 513 U.S. 1121 (1995)). But the other courts of appeals that have encountered such arguments, including the D.C. Circuit in *Princz*, have rejected them.

The majority in *Princz* held that the FSIA did not provide an exception to immunity that reached the Nazis' slave labor atrocities, and it rejected Judge Wald's contention that violations of fundamental human rights should be deemed an "implied waiver" of immunity under 28 U.S.C. 1605(a)(1). *Princz*, 26 F.3d at 1171-1175. The majority reasoned that "something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world." *Id.* at 1174-1175 n.1.

The Seventh Circuit, in *Sampson* v. *Federal Republic of Germany*, 250 F.3d 1145 (2001), also rejected the argument that the Nazi slave labor atrocities warranted creating an

exception from immunity. The court stated that "[t]he potential scope of a customary international law exception to foreign sovereign immunity * * * would allow for a major, open-ended expansion of our jurisdiction into an area with substantial impact on the United States' foreign relations." *Id.* at 1156. Similarly, the Second Circuit rejected such arguments in holding that a foreign state retained its immunity from suit alleging that the state was responsible for a terrorist bombing of an airliner. See *Smith* v. *Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 244 (1996).

The court of appeals also placed mistaken reliance on the act of state doctrine and, in particular, the so-called "*Bernstein*" exception to that doctrine. See Pet. App. 16a-18a.[22] The act of state doctrine and the *Bernstein* exception say nothing about the scope of foreign sovereign immunity. Indeed, the *Bernstein* litigation (note 22, *supra*), which led to the recognition of the *Bernstein* exception, involved a Dutch corporation, not a foreign government. The State Depart-

[22] The act of state doctrine is a rule of decision, founded on considerations of comity and deference to the Executive Branch's conduct of foreign relations, that "precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964). See *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990). The *Bernstein* exception arose from a private plaintiff's attempt to recover commercial property, originally seized by the Nazis, from a Dutch corporation. See *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 173 F.2d 71, 72 (2d Cir. 1949). The plaintiff's claims raised questions respecting the validity of acts of Nazi officials in Germany. The Second Circuit initially concluded that the act of state doctrine precluded inquiry into those questions. *Ibid.* The State Department thereafter issued the so-called *Bernstein* Letter stating a policy "to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." See *Bernstein* v. *Nederlandsche-Amerikaansche*, 210 F.2d 375, 376 (2d Cir. 1954).

ment's *Bernstein* Letter addressed solely whether it was appropriate for a United States court to "pass upon the validity of the acts of Nazi officials" in Germany. *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375, 376 (2d Cir. 1954). The *Bernstein* Letter does not speak at all to the susceptibility of the German government, let alone the Austrian government, to suit in United States courts for acts in Austria. See Letter from Legal Adviser Monroe Leigh to the Solicitor General (Nov. 26, 1975) (describing the *Bernstein* Letter as "advis[ing] that the *act of state doctrine* need not apply to a class of cases involving Nazi confiscations" (emphasis added)), *reprinted in Alfred Dunhill*, 425 U.S. at 706, 708.[23]

In focusing on irrelevant matters, such as the *Bernstein* exception to the act of state doctrine, the court of appeals ignored the concrete steps the United States has actually taken to redress Nazi-era wrongs. The United States did not encourage private litigation against foreign states in

[23] This Court has itself recognized that, while the act of state doctrine "shares with the immunity doctrine a respect for sovereign states," the doctrines are distinct and serve different purposes. *Sabbatino*, 376 U.S. at 438. See *Zwack* v. *Kraus Bros. & Co.*, 237 F.2d 255, 259-261 (2d Cir. 1956) (declining, with reference to the *Bernstein* Letter, to recognize the validity of Hungary's uncompensated expropriation, while, at the same time, recognizing that the Hungarian government itself was "not subject to the jurisdiction of the court below unless its should voluntarily appear"). The distinction between the doctrines is also evident in the so-called Second Hickenlooper Amendment, which, in response to *Sabbatino*, eliminated the act of state doctrine in certain cases concerning expropriations in violation of international law. 22 U.S.C. 2370(e)(2). It was widely understood that this legislation was "restricted entirely to the act of state doctrine" and did not "deny the foreign defendant its defense of sovereign immunity." Comment, *supra*, 123 U. Pa. L. Rev. at, 623 n.64. See also Andreas F. Lowenfeld, *supra*, 59 Am. J. Int'l L. at, 907; *American Hawaiian Ventures, Inc.* v. *M.V.J. Laturharhary*, 257 F. Supp. 622 (D.N.J. 1966).

United States courts as the appropriate means of remedying those wrongs. Instead, the United States committed considerable energy to obtaining redress through other means. It entered into post-war treaties with both Germany and Austria, obtaining promises on the part of those governments to provide for the return of confiscated property. See note 12, *supra*. It also negotiated agreements or provided, through legislation, for the payment of certain claims. See note 18, *supra*. Those arrangements envisioned restitution or compensation under schemes adopted as part of domestic German or Austrian law, through diplomatic arrangements, or through domestic administrative schemes, such as Austria's recent program to review claims for the return of art. See Pet. App. 7a, 46a. In no case has the United States created "a private right of action against our wartime enemies or their nationals." *Deutsch* v. *Turner Corp.*, 324 F.3d 692, 712 (9th Cir.), cert. denied, 124 S. Ct. 105 (2003).

4. Austria did not lose its right to absolute sovereign immunity in United States courts by adopting the restrictive theory of foreign sovereign immunity. The court of appeals incorrectly concluded that application of the FSIA expropriation exception to Austria was not impermissibly retroactive because it "affect[s] only *where* a suit may be brought, not *whether* it may be brought at all." Pet. App. 20a (quoting *Hughes*, 520 U.S. at 951). The court of appeals reached that conclusion on the mistaken understanding that, because Austria had itself adopted the restrictive theory of foreign sovereign immunity in the 1920s, it "could have had no reasonable expectation of immunity in a foreign court." *Id.* at 19a. But, as previously explained, the restrictive theory preserved a foreign state's immunity from claims concerning its distinctly public acts, "such as nationalization." *Victory Transport*, 336 F.2d at 360. Consequently, the timing of Austria's adoption of the restrictive theory of immunity is irrelevant.

Moreover, Austria's application of the restrictive theory of immunity to foreign states in its own courts would not have precluded it from asserting absolute immunity in other countries that continued to adhere to that doctrine. The United States continued through the 1960s to invoke absolute immunity in countries that followed that theory, despite the fact that the United States had applied restrictive immunity principles since 1952. See H.R. Rep. No. 1487, *supra*, at 9. Austria likewise was entitled to invoke sovereign immunity from claims of expropriation in United States courts until the United States provided an exception from that claim of immunity in the FSIA.[24]

* * * * *

The United States has strongly condemned the Nazi atrocities, and it has sought to rectify Nazi wrongs through diplomatic and other means. But the United States has not authorized United States courts to serve as the fora for resolving war-related claims against the governments of Germany, its Axis allies, or other nations, such as Austria, that Germany occupied during the war. In the absence of such authorization, the courts would not, on their own, have created an exception to the doctrine of absolute immunity. The court of appeals' contrary conclusion is mistaken, it departs from settled understandings in the international community, and it may have serious consequences for the United States' conduct of its foreign relations, including reciprocal treatment of the United States in foreign courts.

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[24] Austria was also entitled to invoke its right to sovereign immunity in United States courts even though Austria had enacted laws allowing respondent to litigate her takings claim in Austrian courts. A nation's waiver of its sovereign immunity in its own courts does not constitute a waiver of its sovereign immunity in another sovereign's courts. See, *e.g.*, *Minnesota* v. *United States*, 305 U.S. 382, 388-389 (1939).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

The expropriation exception of the Foreign Sovereign Immunities Act provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> * * * * *
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. 1605(a)(3).